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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 245

ZIFFRIN, INCORPORATED,

Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTER-STATE COMMERCE COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA.

STATEMENT AS TO JURISDICTION.

HOWELL ELLIS,
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Counsel for Appellant.

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

No. 448 Civil

ZIFFRIN, INCORPORATED, A CORPORATION,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION,

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA.

JURISDICTIONAL STATEMENT.

Filed June 10, 1942.

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1. The jurisdiction of the Supreme Court of the United States to entertain this appeal is believed to be sustained by Act of Congress of March 3, 1911, Chapter 231, Sec. 210, 36 Stat. 1150, and by Act of Congress of October 22, 1913, Chapter 32, 38 Stat. 220, United States Code, Title 28, Sec. 47a, being section 210 of Judicial Code.

2. The final judgment sought to be reviewed was entered in the above entitled action on June 4, 1942, and the application of plaintiff for appeal was presented on June 10, 1942.

3. This action does not involve the validity of any statute of any State or of any statute or treaty of the United States.

4. The nature of this case and action, the nature of the rulings of the court which were such as to bring this case within the jurisdictional provisions relied upon, a statement of the grounds upon which it is contended that the questions involved are substantial, and citations to the cases believed to sustain the jurisdiction, are next set forth under paragraphs hereof indicated (a), (b), (c) and (d), respectively, to-wit:

(a) Nature of the case.—The action, instituted October 21, 1941, in the District Court of the United States for the Southern District of Indiana, is one in which the plaintiff, Ziffrin, Incorporated, an Indiana corporation, seeks to obtain interlocutory and permanent injunctions to vacate, set aside and enjoin the enforcement of a certain order of the Interstate Commerce Commission entered May 29, 1941, in its Docket No. MC 2511 entitled Ziffrin, Incorporated Contract Carrier Application. The vacation of said order of the Interstate Commerce Commission and restraint of its enforcement are sought upon the grounds that said order deprives plaintiff of its property without due process of law in contravention of the Fifth Amendment to the Constitution of the United States. This action arises under the Fifth Amendment to the Constitution of the United States, and under the laws of the United States, and more particularly under 54 Stat. 916, being section 17 (9) of Part I of the Interstate Commerce Act, United States Code, Title 49, Sec. 17 (9); and Section 205 (g) of Part II of the Interstate Commerce Act, Acts of Congress August 9, 1935, Ch. 498, 49 Stat. 548, and amended June 29, 1938, Ch. 811, Secs. 5-7, 52 Stat. 1237, 1238; United States Code, Title 49, Sec. 305 (g); and Act of Congress October 22, 1913, Ch. 32, 38 Stat. 219, 38 Stat. 220, United States Code, Title 28, Secs. 41 (28), 43-48, 45a and 47a. Said application for interlocutory and permanent injunctions were presented to the United States District

Court for the Southern District of Indiana and to the Honorable Robert C. Baltzell, Judge thereof, who thereupon and conformably with the provisions of the Act of Congress of October 22, 1913, Ch. 32, 38 Stat. 220, called to his assistance to hear and determine said applications the Honorable Sherman Minton, Circuit Judge, and the Honorable John P. Barnes, District Judge. Answers were filed by defendants and at the hearing on the application for an interlocutory injunction, by agreement of counsel for all parties, defendant Interstate Commerce Commission agreed to extend the date of the taking effect of its order pending the determination of this action on final hearing and the date of taking effect of said order complained of was extended until June 5, 1942. The District Court did not rule on the application for interlocutory injunction.

On January 17, 1942, the action was submitted after final hearing and argument. On February 4, 1936, Ziffrin, Incorporated, an Indiana corporation, filed its application with the Interstate Commerce Commission pursuant to Acts of Congress, August 9, 1935, Ch. 498, 49 Stat. 552, being Section 209 (a) of the Motor Carrier Act of 1935, for a permit authorizing it to continue its operations as a contract carrier of property by motor vehicle in interstate and foreign commerce from certain designated points in Indiana to points and places in Indiana, Ohio, Kentucky, Illinois, Western Iowa, Southeastern Wisconsin, West Virginia, to Buffalo, New York, Pittsburgh, Pennsylvania, and St. Louis, Missouri over irregular routes. After proceedings had in accordance with the rules and regulations of the Interstate Commerce Commission on May 29, 1941, the Interstate Commerce Commission issued its order denying plaintiff's application in toto and requiring plaintiff to cease all of its operations in interstate and foreign commerce, as aforesaid, finding that plaintiff and Ziffrin Truck Lines, Inc., a common carrier, were owned, controlled and managed

in a common interest, and that the continued operation of plaintiff and said Ziffrin Truck Lines, Inc. would not be consistent with the public interest and with the national transportation policy in view of the provisions of Acts of Congress June 29, 1938, Ch. 811, Sec. 10, 52 Stat. 1238 as amended, Act of Congress September 18, 1940, Ch. 722, Title I, Sec. 21 (b), 54 Stat. 923, being Section 210 of Part II of the Interstate Commerce Act, as amended September 18, 1940. Reconsideration of said order of May 29, 1941, was denied by the Interstate Commerce Commission on September 29, 1941, and on October 21, 1941, this action was begun in the United States District Court for the Southern District of Indiana. On June 4, 1942, the District Court of the United States for the Southern District of Indiana filed its Special Finding of Fact and Conclusions of Law and entered final judgment dismissing this cause for want of equity. A copy of said Special Findings of Fact and Conclusions of Law and Judgment are attached hereto as Appendix A.

(b) The rulings of the Statutory Three-Judge Court which heard the case were such as to bring the case within the jurisdictional provisions relied upon because said ruling dismissed the case for want of equity and said final judgment of said court denied plaintiff a permanent injunction enjoining the enforcement of said order of the Interstate Commerce Commission approved May 29, 1941, in its Docket No. MC 2511 entitled Ziffrin, Incorporated Contract Carrier Application.

(c) The questions involved are substantial in that the case involves the right of plaintiff to continue a lawful business which has been in continuous existence since 1933 and which had gross revenues for the first eleven months of 1940 of $498,138.18. The record shows the value of the business to be $500,000.00, and the plaintiff fur-

nishes employment to one hundred and fifty employees with an annual payroll of $150,000.00. The order of the Interstate Commerce Commission approved May 29, 1941, and the judgment of the Statutory Three-Judge Court dismissing this case excludes plaintiff from continuing its lawful business as a contract carrier of property and deprives plaintiff of its property without due process of law, and discriminates against plaintiff and in favor of common carriers of freight by motor vehicle without any proper ground for such differentiation. The cases showing the questions involved to be substantial are:

Michigan Pub. Util. Comm. v. *Duke*, 266 U. S. 570, 69 L. Ed. 445;

Buck v. *Kuykendall*, 267 U. S. 307, 69 L. Ed. 623;

Bush & Sons Co. v. *Maloy*, 267 U. S. 317, 69 L. Ed. 627;

Frost Trucking Co. v. *Railroad Com.*, 271 U. S. 583, 70 L. Ed. 1101;

Smith v. *Cahoon*, 283 U. S. 553, 75 L. Ed. 1264;

Allen v. *Galveston Truck Line Corp.*, 289 U. S. 708, 77 L. Ed. 1463.

(d) The cases believed to sustain the jurisdiction of the Supreme Court of the United States to entertain this appeal are:

Baltimore and Ohio R. Co. v. *United States* (1936), 298 U. S. 349, 80 L. Ed. 1209;

St. Joseph Stockyards v. *United States* (1936), 298 U. S. 38, 56 Sup. Ct. Rep. 120, 80 L. Ed. 1033;

United States v. *Maher*, 307 U. S. 148;

Hoey v. *United States*, 308 U. S. 510;

Shaffer v. *Carter*, 252 U. S. 37, 64 L. Ed. 445;

Packard v. *Banton*, 264 U. S. 140, 68 L. Ed. 596;

Pacific Tel. & Tel. Co. v. *Kuykendall*, 265 U. S. 196, 68 L. Ed. 975;

Michigan Public Utilities Commission v. *Duke*, 266 U. S. 570, 69 L. Ed. 445;
Buck v. *Kuykendall*, 267 U. S. 307, 69 L. Ed. 623;
In re Buder, 271 U. S. 461, 70 L. Ed. 1036;
Interstate Busses Corp. v. *Holyoke Street R. Co.*, 273 U. S. 45, 71 L. Ed. 530;
Clark v. *Poor*, 274 U. S. 554, 71 L. Ed. 1199;
Morris v. *Duby*, 274 U. S. 135, 71 L. Ed. 966;
Interstate Busses Corp. v. *Blodgett*, 276 U. S. 245, 72 L. Ed. 551;
Continental Baking Co. v. *Woodring*, 286 U. S. 352, 76 L. Ed. 1155;
Kroger Grocery & Baking Co. v. *Lewis* (heard and reported with *Stewart Dry Goods Co.* v. *Lewis*), 287 U. S. 9, 77 L. Ed. 135;
Allen v. *Galveston Truck Line Corporation*, 289 U. S. 708, 77 L. Ed. 1463;
Spielman Motor Sales Co. v. *Dodge*, 295 U. S. 89, 79 L. Ed. 1322;
Bingaman v. *Golden Eagle Western Lines*, 297 U. S. 626, 80 L. Ed. 928;
South Carolina State Highway Department v. *Barnwell Bros.*, 303 U. S. 177, 82 L. Ed. 469.

5. It is claimed that the Statutory Three-Judge Court abused its discretion in denying the permanent injunction aforementioned in that said court erred in applying to a record made and facts existing before September 18, 1940, an Act of Congress September 18, 1940, Ch. 722, Title I, Sec. 16, 21 (a), 54 Stat. 919, 923, being Sec. 210 of Part II of the Interstate Commerce Act, United States Code, Title 49, Section 310.

6. The plaintiff appends hereto, marked "Appendix A", a copy of the Special Findings of Fact and Conclusions of

Law and the Judgment of the aforesaid Statutory Three-Judge Court dated, filed and entered June 4, 1942, which by the terms and provisions of the final judgment appealed from, constitutes the sole grounds for the court taking the action and making the rulings and decisions complained of upon this appeal. No other opinions were issued in this case.

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APPENDIX "A".

DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION.

No. 448 Civil.

Ziffrin, Incorporated, a Corporation,

vs.

United States of America, Interstate Commerce Commission.

Before the Honorables, Sherman Minton, U. S. Circuit Judge, and Robert C. Baltzell and John P. Barnes, District Judges.

Come now the parties by their respective attorneys and the Court having heard the evidence and argument of counsel and being sufficiently advised in the premises, now, pursuant to Rule 52 of the Rules of Civil Procedure, signs and files herein its special findings of fact and states its conclusions of law thereon, which said special findings of fact and conclusions of law are ordered by the Court filed and made a part of the record in this cause, all of which is now done.

Upon the foregoing special findings of fact and conclusions of law, it is,

Ordered, Adjudged and Decreed:

1. That this cause be and the same is hereby dismissed for want of equity.

2. That the defendants recover of and from the plaintiff their costs, herein taxed at $——.

(Signed) Sherman Minton,
Judge, United States Circuit Court of Appeals.
Robert C. Baltzell,
Judge, United States District Court.
John P. Barnes,
Judge, United States District Court.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION.

CIVIL ACTION.

No. 448.

ZIFFRIN, INCORPORATED, a Corporation, et al., *Plaintiff*,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al., *Defendants*.

Special Findings of Fact.

Pursuant to Rule 52 of the Rules of Civil Procedure, the court now states its Special Findings of Fact, as follows:

I.

That, on February 4, 1936, the plaintiff, Ziffrin, Incorporated, of Indianapolis, Indiana, filed an application with the Interstate Commerce Commission pursuant to section 209 (a) of the Motor Carrier Act, 1935, for a permit authorizing the continuance of operations as a contract carrier by motor vehicle in interstate commerce or foreign commerce of general commodities from certain designated points in Indiana to points and places in Indiana, Ohio, Kentucky, Illinois, western Iowa, southeastern Wisconsin, West Virginia, to Buffalo, New York, Pittsburgh, Pennsylvania and St. Louis, Missouri, over irregular routes.

II.

That this application was referred to a field representative of the Commission to investigate the nature and extent of plaintiff's operations, and, as a result of his report, the Commission, on March 5, 1938, issued a so-called compliance order authorizing plaintiff to engage in contract carrier transportation by motor vehicle according to specifications set forth therein. This order provided for the filing of protest within thirty days of its entry; such protest was duly filed; the compliance order was vacated pursuant to its terms; and the application was set down for formal hearing before an examiner.

III.

That the protest referred to above called the Commission's attention particularly to the relationship of plaintiff to Ziffrin Truck Lines, Inc., a common carrier, disclosed by Commission's Docket No. MC-2510, and alleged that issuance of a permit to plaintiff would violate section 210 of the Motor Carrier Act.

IV.

That, accordingly, the notice of hearing on plaintiff's application stated that inquiry would be made into the relationship between plaintiff and Ziffrin Truck Lines, Inc. in the light of the provisions of section 210 of the Motor Carrier Act, 1935. Reference was made to section 5(6) of Part I of the Interstate Commerce Act as then constituted, for the purpose of indicating that the scope of the inquiry would include the question as to control or management in a common interest of the plaintiff and Ziffrin Truck Lines, Inc.

V.

That, in due course, plaintiff's application was referred to an examiner. Evidence was fully developed by plaintiff and other parties to the proceeding on the issues raised by the application, the protest and the notice of hearing.

VI.

That, after an unfavorable report by the examiner, the case was reviewed by Division 5 of the Commission on plaintiff's exceptions to the examiner's report and on oral argument. On May 29, 1941, the Division issued a report finding that plaintiff was in operation on July 1, 1935, and continuously since that time as a contract carrier of certain commodities between specified points and destinations. A permit was denied, however, because it was found that plaintiff and Ziffrin Truck Lines, Inc., the common carrier, was owned, controlled and managed in a common interest, and that under section 210 of the Act the holding of a permit by the plaintiff authorizing contract carrier operations would not be consistent with the public interest and with the national transportation policy. Plaintiff's application for reconsideration was denied by the full Commission on September 29, 1941.

VII.

That the complaint in this case was filed on October 21, 1941, and answers were duly filed on behalf of the United States and the Interstate Commerce Commission. Argument was had and the case submitted on final hearing on January 17, 1942. At the hearing plaintiff introduced in evidence a certified copy of the record before the Interstate Commerce Commission, and certain additional evidence designed to show the extent of the damage to plaintiff from the operation of the Commission's order.

VIII.

That on the issue order section 210 as to the relationship between Ziffrin Truck Lines, Inc., the common carrier, and plaintiff, the record before the Commission showed that Sam Ziffrin was the president and general manager of both concerns. At the time of the hearing the board of directors, the officers and the sole stockholders of the plaintiff corporation were Sam Ziffrin, Mrs. R. Levi, S. O. Berman, and Lewis Berger. Mrs. Levi is Sam Ziffrin's sister. Apparently she took some part in the corporate affairs; Ziffrin testified that she attended directors' meetings regularly. The position of Berger and Berman was not entirely clear on the record. Ziffrin testified that Berger had not attended a directors' meeting in over two years, and Berman had attended only one meeting during the year preceding the hearing. The stock of plaintiff corporation consisted of 1,000 shares. Sam Ziffrin owned 495 shares, and his sister, Mrs. Levi, owned 15 shares. Mr. Berman owned 390 shares and Mr. Berger 100 shares. In the common carrier company Sam Ziffrin owned 98 per cent of the stock, and the remaining 2 per cent was owned by members of his family. The officers, directors and stockholders of that concern were Sam Ziffrin, Esther Ziffrin, his wife, and David and Lewis Ziffrin, his sons. Mrs. Ziffrin was also assistant treasurer of the plaintiff corporation. Other evidence of close relation between the two companies is to be found in the joint use of equipment and employees, which the record plainly disclosed. Sam Ziffrin represented both the common and contract carriers in their dealings with shippers.

IX.

That there was sufficient substantial evidence presented to the Commission to sustain its conclusion and order.

(Signed) SHERMAN MINTON,
Judge, United States Circuit Court of Appeals.
ROBERT C. BALTZELL,
Judge, United States District Court.
JOHN P. BARNES,
Judge, United States District Court.

Dated this 4th day of June, 1942.

Conclusions of Law.

Upon the above and foregoing Special Findings of Fact, the court now states its Conclusions of Law, as follows, to-wit:

I.

That the law is with the defendants; that there is substantial evidence to support the order of the defendant, Interstate Commerce Commission, and the complaint should be dismissed for want of equity.

II.

That the defendants should recover of and from the plaintiff their costs herein, taxed at $——.

(Signed) SHERMAN MINTON,
Judge, United States Circuit Court of Appeals.
ROBERT C. BALTZELL,
Judge, United States District Court.
JOHN P. BARNES,
Judge, United States District Court.

Dated this 4th day of June, 1942.